DOCKET NO. HHB-CV21-6070448- S : SUPERIOR COURT

FAIR HAVEN COMMUNITY HEALTH CLINIC, INC., Petitioner, : JUDICIAL DISTRICT OF NEW BRITAIN

v. : AT NEW BRITAIN

STATE OF CONNECTICUT, DEPARTMENT OF SOCIAL SERVICES, Respondent : DECEMBER 6, 2022

DECISION OF ARBITRATION BOARD

Petitioner's Counsel: Attorneys Joan W. Feldman, Esq.; Damian J. Privitera, Esq. & Christopher J. Cahill, Esq. of Shipman & Goodwin, LLP

Respondent's Counsel: Attorneys Tanya F. DeMattia, Esq. & Elizabeth H. Bannon, Esq. of Office of the Attorney General

Arbitrators: Hon. Joseph M. Shortall, Hon. Terence A. Zemetis (ret.) & Thomas J. Ring, Esq.

CONTEXT OF ARBITRATION

Fair Haven Community Health Clinic, Inc., Fair Haven, a federally qualified health center, FQHC, under the Social Security Act (for Medicaid patients) and Public Health Service Act (for uninsured patients), which operates fourteen (14) locations, serving approximately 26,000 patients, was denied an increase in payment by the State of Connecticut Department of Social Services, DSS, for Fair Haven's 2019 Rate Adjustment Request.

As Petitioner[1] succinctly frames the history: "Fair Haven first sought an adjustment to its Medicaid prospective payment system ("PPS") medical encounter rate in March of 2016, based in part, on a change in Fair Haven's scope of its services, including but not limited to, the

[1] Fair Haven's Items of Aggrievement, Record p. 43.

Sent to Shipman+Goodwin, Tanya DeMattia, Liz Bannon and Patrick McCooey
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Electronic notice sent to all counsel of record. A. [illegible], ct officer 12/6/22

addition of new service sites, the addition of specialty services, the addition of medication assisted treatment, and more generally, increased costs in the delivery of healthcare services ("2016 Rate Adjustment Requests"). In response to the 2016 Rate Adjustment Request, Commissioner Bremby, by way of letter dated June 27, 2016, denied the request and stated that more data was needed to evaluate the 2016 Rate Adjustment Request ("Bremby Letter"). Fair Haven requested reconsideration of that decision, and in response, Deputy Commissioner Kathleen Brennan, by way of letter dated July 22, 2016, upheld DSS's denial of Fair Haven's request ("Brennan Letter"). In 2019, Fair Haven submitted its second rate adjustment request ("2019 Rate Adjustment Request"), supported by additional data, which was ultimately denied, by way of letter dated January 10, 2020 ("McEvoy Letter") . . ."

The Respondent[2] succinctly summarized the proceedings after the January 10, 2020 DSS denial ("McEvoy Letter"): "(T)hese arbitration proceedings commenced when provider Fair Haven Community Health Clinic, Inc. ("Fair Haven") submitted a request for arbitration pursuant to Conn. Gen. Stat. § 17b-238 (b) and Conn. Agencies Reg. §§ 17-311-107 *et. seq.* from a hearing officer's final decision after a rehearing held pursuant to Conn. Gen. Stat. § 17b-238 (d) on the State of Connecticut, Department of Social Services' ("Department" or "DSS") January 20, 2021 denial of Fair Haven's April 25, 2019 requested rate increase based on change in scope of services. (Docket No. 100.31; R. at 0039-0059; R at 0001)."

Petitioner timely sought arbitration pursuant to Conn. Gen. Stat. § 17b-238 (b) and Conn. Agencies Reg. §§ 17-311-107 *et. seq.*

[2] DSS Substitute Supplemental Brief, May 5, 2022, Docket No. HHD CV 21 6070448, entry 126.1

The Arbitrators swore the oath of office, pursuant to C.G.S. §§ 1-25 & 52-414 (d).

The Arbitrators affirm they have no undisclosed social, economic,[3] or other relationship with the parties or counsel, other than the collegiality of members of the same profession, nor any undisclosed economic interest in the outcome, affecting their ability to impartially and fairly hear and decide the matter.

Full exhibits admitted by agreement and order: The Administrative Record, Parts 1 & 2, totaling 2299 pages and the email chain appended to Petitioner's April 21, 2022 motion.[4]

Issue submitted to arbitration: Within the limits prescribed by Connecticut Agencies Regulations § 17-311-112, "Scope of Review,"[5] the Arbitration Board reviews the September 24, 2021 DSS final decision on the rehearing of DSS's January 10, 2020 decision denying the Petitioner's April 25, 2019 requested rate increase.

Items of aggrievement not raised in the Petitioner's April 25, 2019 request for rate increase were not considered in DSS's January 10, 2020 decision. Consequently, the DSS's rehearing and the September 24, 2021 final decision addressed only Petitioner's items of aggrievement raised in April 2019. Therefore, the scope of review permitted to this Arbitration Board extends only to the items of aggrievement raised by Fair Haven in its April 2019 request. Insofar as Fair Haven's 2019 request for a rate increase refers to changes in its scope of services that were raised in its 2016 request, this Arbitration Board has considered those changes separately and independently from the 2016 request.

DISCUSSION

The Arbitration Board finds DSS's decision to be inconsistent with the federal

[3] Counsel know all arbitrators are receiving State retirement benefits including the arbitration chair, Hon. Joseph M. Shortall, who currently serves as a Judge Trial Referee with the CT Judicial Department.
[4] Docket No. HHD CV 21 6070448, entry 124.
[5] Conn. Agencies Regs. § 17-311-112.

Prospective Payment System ("PPS") to the extent DSS relied upon factors other than costs associated with changes in scope of services in its decision denying Fair Haven's request for a rate adjustment.

DSS's January 10, 2020 denial of Fair Haven's request included the following reasoning:

> the Department reviewed the overall financial circumstances of Fair Haven through its cost report and audited financial statements. The review of the audited financial statements and Fair Haven's 2017 and 2018 cost reports did not demonstrate the need for a rate adjustment.

Record, p. 114. The Hearing Officer's final decision similarly included the following statement:

> To the extent that Fair Haven sought a rate increase based upon purported costs, losses and changes in volume at the three identified sites, the Department was permitted to analyze the data across all of Fair Haven's sites.

Record, p. 23.

On September 12, 2001, the Centers for Medicare and Medicaid Services ("CMS") issued guidance, in the form of questions and answers, regarding the implementation requirements of the new Prospective Payment System governing the establishment of rates for FQHCs. CMS provided the following guidance regarding cost reports or other accounting methods:

> The purpose of a PPS is to move away from cost reports and cost reconciliation. The legislation requires that a change in the rates under the PPS methodology can only be based on the Medicare Economic Index (MEI) and a change in the scope of services. The State must develop a process necessary for determining a change in scope of services. However, if the State determines it has a continued need for

cost reports or other accounting method, it has the flexibility to require such reports.

Record, p. 647 (Q & A no. 10). With regard to a change in the scope of service, CMS advised that:

A change in the 'scope of services' is defined as a change in the type, intensity, duration and/or amount services. A change in the cost of a service is not considered in and of itself a change in the scope of services. In making such an adjustment, state agencies must add on the cost of new FQHC . . . services . . . .

Record, p. 650 (Q & A no. 20).

On May 21, 2001, CMS (then known as HCFA, or Health Care Financing Administration) responded to issues raised by the Executive Director of the Connecticut Primary Care Association concerning DSS's state plan amendment implementing the new PPS. With regard to continued cost reporting under PPS, CMS stated the following:

HCFA believes the Department has the discretion to require continued cost reporting. . . . However, you are correct in your concern that cost reports submitted in years, after the base year, should not be used in adjusting the visit rate. In our discussion with the Department, it was agreed that . . . the proposed regulation will be revised to indicate that the Department retains the right to use only the fiscal year 1999 and 2000 cost reports for purposes of adjusting the base year (i.e. January 1, 2001 to September 30, 2001) visit rate. Further, the Department will clarify that cost reports submitted after the base year will be used for informational purposes and to serve as documentation for costs associated with changes in scope of services.

Record, p. 629.

DSS regulations include as an example of a change in scope of services "[a] change in the volume or amount of services as a result of a significant expansion . . . of an existing clinic, or the addition . . . of a satellite or new site. . . ." Conn. Agencies Reg. Sec. 17b-262-1001 (b) (1). Fair Haven's 2019 Rate Adjustment Request identified three sites which it had added to its service locations: 50 Grand Avenue, New Haven, CT, and school-based centers at East Haven High School and Joseph Melillo Middle School in East Haven, CT.[6]

"State participation [in Medicaid] is voluntary, but once a State elects to join the program, it must administer a state plan that meets federal requirements." *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 433 (2004). The Arbitration Board finds that DSS was required to reach a decision on Fair Haven's 2019 Rate Adjustment Request based on whether Fair Haven experienced "a change in the volume or amount of services as a result of" these new sites and, if so, what additional costs attributable to these new sites Fair Haven incurred.[7] The Arbitration Board further finds that DSS's reliance on other factors, e.g., Fair Haven's overall financial circumstances, did not comport with the federal requirements pertaining to rate adjustments under PPS. In making this finding, the Arbitration Board is cognizant of Conn. Agencies Reg. Sec. 17b-262-1001 (h) which provides that "[i]n making its determination with respect to whether a FQHC's encounter rate may be adjusted based upon a change in scope of services, the

[6] Fair Haven specified in its request that it was not seeking a rate adjustment based on a fourth site it had added, i.e., 370 Hemingway Avenue, East Haven, CT.

[7] The Arbitration Board finds the question of whether Fair Haven waived issues raised in its February 2016 Rate Adjustment Request to be moot, since Fair Haven did not incorporate its 2016 request into its April 2019 request and, apart from the 50 Grand Avenue site, did not separately raise issues in April 2019 that it had raised in 2016.

Department shall review . . . [t]he FQHC's cost report . . . [and] [t]he FQHC's audited financial statements. . . ." It bears repeating, however, that the State must meet federal requirements.

The Arbitration Board concludes that Fair Haven's substantial rights have been prejudiced because the DSS decision is "[i]n violation of . . . statutory provisions; . . . [a]ffected by other error of law; [or] characterized by abuse of discretion or clearly unwarranted exercise of discretion." Conn. Agencies Reg. Sec. 17-311-112.

FINDINGS AND ORDERS

1. The Arbitration Board AFFIRMS the DSS decision on rehearing insofar as it addresses items of aggrievement A, B, and G.
2. The Arbitration Board AFFIRMS the DSS decision on rehearing insofar as it addresses item of aggrievement E and remands the case to the Commissioner "to take all necessary administrative steps to implement a $1.93 increase in Fair Haven's medical encounter rate based on a change in scope related to the implementation of MAT, retroactive to September 1, 2019."
3. The Arbitration Board AFFIRMS the DSS decision on rehearing insofar as it addresses item of aggrievement F and remands the case to the Commissioner "to take all necessary administrative steps to implement a $0.60 increase in Fair Haven's medical encounter rate, based on a change in scope related to the implementation of e-consults, retroactive to September 1, 2019."
4. The Arbitration Board FINDS, pursuant to Connecticut Agency Regulation 17-311-112, that the DSS decision on rehearing, insofar as it addresses items of aggrievement

C and D, prejudices substantial rights of Fair Haven because the decision is "(i)n violation of . . . statutory provisions; . . . (a)ffected by other error of law [and] characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The decision failed adequately to consider what appears to this Arbitration Board to be a change in Fair Haven's scope of services occasioned by the "change in the volume or amount of [Fair Haven's] services as a result of . . . the addition . . . of . . ." new sites at 50 Grand Avenue and the East Haven schools. See Conn. Agency Reg. 17b-262-1001 (b) (1).

The Arbitration Board REVERSES the Department's rehearing decision and REMANDS the case to the Department to reopen the rehearing. At the reopened rehearing the Department shall determine whether the amount, type and intensity of Fair Haven's services have increased because of the opening of its sites at 50 Grand Avenue in 2015 and East Haven High School and Melillo Middle School in 2017 and, if so, how Fair Haven's medical encounter rate should be adjusted to take into account such an increase in the scope of its services. In making this determination the Department may require and Fair Haven may submit such additional information regarding the functioning of these additional sites and the operational costs associated with these sites.

Honorable Joseph M. Shortall
Honorable Terence A. Zemetis (Ret.)
Attorney Thomas J. Ring